APPENDIX

1 - The Opinion of the United States Court of Appeals for the Fourth Circuit decided July 5, 1995 ..... 1A

2 - The Memorandum Opinion and Order of the United States District Court entered June 13, 1994 ..... 9A

3 - Excerpts from Record on Appeal 17A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WALTER P. MAXWELL,
Plaintiff-Appellant,

v.

E-SYSTEMS, INCORPORATED, MELPAR DIVISION,
Defendant-Appellee.

No. 94-1785

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-93-1518-A)

Argued: May 1, 1995

Decided: July 5, 1995

Before HALL, WILKINSON, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John Michael Bredehoft, CHARLSON & BREDEHOFT, P.C., Fairfax, Virginia, for Appellant. Paul Charles Skelly, HOGAN & HARTSON, L.L.P., McLean, Virginia, for Appellee. **ON BRIEF:** Elaine C. Bredehoft, CHARLSON & BREDEHOFT, P.C., Fairfax, Virginia, for Appellant. William P. Flanagan, Amy Folsom Kett, HOGAN & HARTSON, L.L.P., McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Walter P. Maxwell appeals the summary judgment granted to his employer, E-Systems, Inc., in Maxwell's age and disability discrimination action. We affirm.

I

E-Systems produces electronics systems and related products. Maxwell has been employed as an engineer with the Melpar division of the company since 1972. Melpar deals largely in defense-related work for the government. Prior to his demotion, Maxwell had been a supervising engineer and, since 1985, the site leader on the CARDINAL project. In this latter role, which was unofficial and for which he received no additional compensation, he was responsible for operations at a customer's site where testing of some sort of equipment was being performed.[1]

Maxwell was in charge of the retrieval of a "test unit" in May, 1992. The plan developed by Maxwell and his supervisors was to use automated equipment to approach the unit and then switch to hand tools to retrieve it. Maxwell, however, used automated equipment throughout the process and, according to E-Systems, the unit was damaged and critical test data was lost. Maxwell was orally reprimanded and warned.

In January, 1993, Maxwell was in charge of another retrieval effort. Although his supervisor had advised him to use hand tools throughout the process, Maxwell instead used automated equipment. When Maxwell briefly turned away from the coworker who had been

[1]The CARDINAL project was classified, so the government customer and the nature of the equipment and testing have not been revealed.

relaying hand signals to guide him, the retrieval machine contacted the test unit. This accident was termed "a disaster" by E-Systems. As a consequence, Maxwell was demoted from his supervisory engineer position, and his annual salary was cut by $10,000. His site leader duties were reassigned to 53-year-old Larry Coughenour, and his supervisory duties were assumed by 32-year-old Frank Asencio. Maxwell, who had had serious heart problems in the late 1980s, was 62 years old at the time. In November, 1993, Maxwell filed this action, alleging that his age and/or a perceived disability were motivating factors in the demotion decision.

II

To recover under the Age Discrimination in Employment Act [ADEA],[2] a plaintiff must prove that, "but for the employer's motive to discriminate against the employee because of the employee's age, the employee would not have suffered the [unfavorable employment] action." *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993). A plaintiff may prove his case by either direct or indirect evidence or by using the proof scheme originally formulated for Title VII cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982) (adapting the *McDonnell* Douglas scheme for ADEA cases). Maxwell's case proceeded along this judicially created proof scheme.

In the context of an age discrimination action, the modified *McDonnell Douglas* scheme places the initial burden of production on the plaintiff to make out a *prima facie* case of illegal discrimination by establishing[3] that (1) the employee was over the age of 40; (2) he suffered an unfavorable employment action; (3) he was at the time meeting his employer's legitimate expectations; and (4) he was

[2]29 U.S.C. § 621 *et seq.*

[3]We have recently described this initial burden as entailing "pro[of] of a set of facts which would enable the fact-finder to conclude with reasonable probability that *in the absence of any further explanation*, the adverse employment action was the product of age discrimination." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (emphasis in original).

replaced by someone outside the protected class (someone under the age of 40). *EEOC v. Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). Establishment of a *prima facie* case raises a presumption of discriminatory motive, and the burden of production shifts to the defendant to advance a legitimate non-discriminatory reason for the employment action. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993). Once this burden is met by the defendant, the presumption vanishes, and the plaintiff is left with the task of meeting his burden of persuasion on the ultimate question: Did the defendant illegally discriminate against the plaintiff? *Id.*[4]

The district court granted summary judgment to E-Systems on alternative bases. First, the district court ruled that, for purposes of the *McDonnell Douglas* scheme, Maxwell had been replaced by Coughenour, who was not outside the protected class, and not by Asencio; therefore, the fourth factor of the *prima facie* case had not been met. Alternatively, the court held that E-Systems' legitimate nondiscriminatory reason for the demotion had not been countered by evidence of pretext and that Maxwell had failed to produce any evidence that his employer's decision was fueled by discriminatory motives. We affirm the judgment of the district court.

---

[4]Maxwell also claims that the company's action was motivated by its perception that Maxwell was disabled as a result of a heart problem. The *McDonnell Douglas* scheme also applies to Maxwell's claim under the Americans with Disabilities Act [ADA]. *Ennis v. Nat'l Assoc. of Business and Educ. Radio, Inc.*, No. 94-1585, slip op. (4th Cir. May 15, 1995). We have recently held that the fourth factor in the establishment of a *prima facie* ADA case is that the adverse employment decision "occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Id.* at 6. However, the only evidence of disability-based discrimination is the company's requirement that he be cleared by his physician before returning to his physically demanding duties at the CARDINAL site. The most favorable inference that Maxwell might squeeze out of this evidence is that E-Systems was concerned about its liability, and even this does not implicate discriminatory intent. The most likely inference, however, is that the company acted out of concern for its employee's well being. The summary judgment on this claim is affirmed for the reasons set forth in the district court's memorandum opinion. *Maxwell v. E-Systems, Inc.*, C/A 93-1518-A (E.D. Va) (June 13, 1994).

III

Our review of the judgment is *de novo*, and we will affirm only if the record shows no genuine issue of material fact. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 115 S. Ct. 67 and 68 (1994). The losing party must point to specific evidence that establishes a triable dispute; mere allegations are insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We view the evidence in the light most favorable to the non-movant. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

A

The core of Maxwell's theory of ADEA liability is that E-Systems hired Asencio in 1990 with a view to replacing Maxwell and that the test-unit incidents were just a cover for promoting Asencio over him. There should be no question but that damage to the test units, if caused by Maxwell, would constitute a legitimate reason for the demotion. The question is whether Maxwell has probative evidence which, if believed by a jury, would be enough to find that the company's explanation for its action was a pretext for discrimination.

In order to proceed beyond the summary judgment stage, Maxwell had to either adduce admissible evidence that (1) the test-unit incidents did not occur as claimed by E-Systems, or (2) if the incidents did occur as claimed, they were merely a cover for discrimination. If there was enough evidence to raise a genuine question regarding whether the incidents occurred, then the stated reasons for the demotion could be found to have been pretextual, and from this, in conjunction with the *prima facie* case, a factfinder could "infer the ultimate fact of discrimination." *St. Mary's Honor Ctr.*, 113 S. Ct. at 2749. Even in the absence of sufficient evidence to raise a genuine issue about the facts underlying the stated reason for the demotion, Maxwell could still survive a motion for summary judgment by coming forth with evidence that the proffered reason, however facially valid, was merely a cover for discrimination. *See id.* at 2747-48. Our review of the record convinces us that Maxwell fails on both points.

B

As a preliminary matter, we first address Maxwell's claim that his inability to obtain some evidence in discovery should alter how we

approach our review of the judgment. Because of CARDINAL's classified status, Maxwell was unable to discover and use information such as the identity of the CARDINAL customer, the nature of the "test unit" and what its retrieval entailed, and the identity of the customer's personnel present at the retrieval attempts. He does not contend that he should have been given access to this information, and he has never sought to compel its disclosure. Instead, he suggests that E-Systems should be precluded from relying on the claim of "legitimate business justification" for the demotion because his ability to counter the company's defense is so dependent on undiscoverable information.

Maxwell's dilemma is the "regrettable consequence" that flows from the judicially recognized privilege for state secrets; "one of the parties' litigation position suffers from its inability to discover and present all of the facts it might seek." *In re Under Seal*, 945 F.2d 1285, 1289 (4th Cir. 1991). The inability of Maxwell to get all that he would have preferred is not grounds for changing the other rules of the game. Very simply, he has to do with what he has.

C

We turn, then, to what the record shows with regard to the stated reason for the demotion. According to Maxwell's supervisor, Jack Jeanes, the May, 1992, removal "destroyed" the test unit and was a serious blow to the company's reputation, and, after the "disast[rous]" January, 1993, accident, something had to be done to mollify the customer. Maxwell argues that the evidence is such at this stage of the proceedings that there is at least a genuine issue as to whether he was responsible for the damage to the units or even whether the units were seriously damaged.

Company memoranda and deposition testimony from company officials amply buttress E-Systems' contention that Maxwell's demotion and reassignment to the central office were primarily done for reasons of "customer relations." E-Systems maintains that the government client was extremely upset with the damage to the test units and that the demotion was necessary to regain the client's confidence. Maxwell merely points to his own deposition testimony that the cus-

tomer representative was not upset "and appeared sympathetic" when informed of the January 1993 incident.[5]

It is undisputed that Maxwell was in charge, that he used automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident. Maxwell's unsupported allegations are not sufficient to create a genuine issue in regard to what caused the damage, what damage was caused, and how the customer reacted. "Mere speculation or the building of one inference upon another" does not create a genuine issue. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Maxwell has not come forth with enough evidence as would permit a reasonable person to conclude that the units were not seriously damaged during the retrievals or that Maxwell was not responsible.

D

We turn, finally, to Maxwell's claim that the stated reasons were nevertheless not the true reasons for the demotion. Maxwell maintains that summary judgment was inappropriate because he has direct evidence of discriminatory intent. When Maxwell was relieved of his site leader responsibilities, he was replaced by 53-year-old Coughenour rather than the more experienced (and 60-year-old) Scalsky. Maxwell argues that this decision was based on Scalsky's age; one of the company supervisors allegedly commented on Scalsky's age and how it would be nice to have someone in the site-leader position with a little more longevity. This comment constitutes the sum total of direct evidence of discrimination toward Maxwell.

Recognition of the effects of age and longevity of employees on long-range company planning is not discriminatory. E-Systems has some 2200 employees, and it only makes sense to make plans to replace older employees. *See Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir. 1994) (employer's "statement that 'there comes a time when we have to make way for younger people' ... creates no inference of age bias [and] reflects no more than a fact of

[5]Appellant's opening brief at 38.

life ...."). Maxwell's evidence of discriminatory intent amounts to no more than his subjective belief, and such evidence, without more, is an insufficient basis for relief in the face of proof of nondiscriminatory reasons for the employment action. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

We hold that Maxwell failed to produce enough evidence to create a genuine issue as to the causes and magnitude of the two retrieval accidents and, further, that he failed to produce sufficient evidence of pretext on E-Systems' part. Accordingly, we affirm the judgment of the district court.

AFFIRMED

APPENDIX PART TWO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

WALTER P. MAXWELL,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 93-1518-A
	)	
	)	
E-SYSTEMS, INC.,	)	
	)	
Defendant.	)	

By: Hon. Claude M. Hilton
United States District Judge

This case came before the Court on defendant's Motion for Summary Judgment. Plaintiff Walter P. Maxwell ("Maxwell") claims that the defendant E-Systems, Inc. ("E-Systems") discriminated against him in violation of the Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §12001 et seq., (the "ADA") and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-34 (the "ADEA"). Jurisdiction is proper for the ADA claim pursuant to 28 U.S.C. §§ 1331 and 1343(a), as well as 42 U.S.C. § 12117(a)> Jurisdiction is proper for the ADEA claims under 28 U.S.C. §§1331 and 1343(a) and 29 U.S.C. § 626(c)(1).

Maxwell began working for E-Systems in 1958, left to pursue other opportunities, returned to the company's Melpar Division in 1971, and has remained there. The

division's principal work is contracting for federal governmental agencies, mostly in defense-related business. At the time of the events giving rise to this dispute, he was a supervising engineer on the company's CARDINAL Operations & Management ("O&M") Program, which is a classified.

Maxwell is now 62 years old. In February 1989, he was diagnosed with congestive heart failure, and in May 1989, he suffered cardiac arrest. In June 1989, doctors installed a defribulator into his chest. Maxwell returned to work full time in October 1989, and except for a short time during late 1991 and early 1992 when he had cancer surgeries, he has worked there without significant interruption on account of his health.

One of Maxwell's responsibilities as supervisor was to be a "site leader" when employees traveled from the Melpar Division's offices in Northern Virginia to the customer's site to perform various tasks required under Melpar's contract with the government. In May 1992 and January 1993, Maxwell was involved in two incidents that led to damage to government-owned test units, or components that were manufactured by E-Systems and installed at the customer site for testing.

In May 1992, Maxwell was site leader in an operation to retrieve a test unit. He selected automated equipment to conduct the removal, and superiors warned him to be careful in using that equipment. The unit was severely damaged upon its removal, and E-Systems blames Maxwell, maintaining that the removal equipment caused the damage. Jack Jeans, the Director of Special Programs, and Bobby Stilwell, Engineering Manager, determined that the damage was a direct result of "a negligent accident."

In January 1993, Maxwell was again site leader for

a removal operation. He was advised to use hand and not automated removal equipment and to be careful not to damage the equipment. Maxwell again chose to use automated removal equipment and worked with a "watcher" who communicated with him by hand signals. Maxwell admits that he looked away from the watcher and did not see his signals to stop and that the removal equipment made contact with part of the test unit. Following the accident, John Hale, Maxwell's supervisor, prepared a report indicating the Maxwell accidently damaged a piece of program equipment at a remote field site using proper procedures. E-Systems claims that as a result of these accidents, it lost a substantial portion of its business from the government customer.

While the company could have fired Maxwell for the damage to the equipment and loss of business, it chose to demote him and strip him of his site leader status. The company reassigned the site leader responsibilities to Larry Coughenour, who was at the time 53 years old and had no known health problems. Maxwell maintains that E-Systems declined to select another person, Stan Scalsky, who is of similar age to Maxwell, because of his age and artificial bladder. There is no dispute that when considering Scalsky, the older of two candidates for the responsibility, Jeans expressed concern about Scalsky's remaining time with the company. The company delegated Maxwell's supervisory responsibilities to Frank Asencio, 32.

Maxwell complains that the company had previously expressed concern about his physical condition and age. Following his heart problems, the company prepared a detailed task description of his job responsibilities. The company explains that the work was done in order to determine the exposure faced by placing the plaintiff on site far away from medical help.

Grants of summary judgment motions are warranted if the pleadings, answers to interrogatories, admissions and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines materiality. That is, only those facts that might be outcome-determinative under the current law are material. A "genuine" issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To prevail on a claim the E-Systems discriminated against him in violation of the ADA and the ADEA, Maxwell must prove that age and disability were "determining factor[s]" in the decision to terminate him. See, e.g., Tuck v. Henkel Corp., 973 F. 2d 371, 374 (4th Cir. 1992), cert. denied, 113 S.Ct. 1276 (1993). In other words, he must show that but for E-Systems' alleged motive to discriminate against him because of his disability and age, Maxwell "would not have suffered the action." Id.

There are two ways Maxwell may meet his burden of proving discriminatory intent. Under the scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), once he proves all of the elements of a prima facia case of discrimination, the burden shifts to the defendant to articulate a legitimate non-discriminatory explanation. See Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1314-15 (4th Cir. 1993); Fink v. Western Elec. Co., 708 F.2d 909 (4th Cir. 1983) (adopting McDonnell Douglas scheme for use in ADEA cases). Once the defendant articulates a non-discriminatory explanation, the presumption of discrimination created by the prima facia case "drops from the case," and the plaintiff bears the ultimate burden to

prove both that the defendant's reasons were pretextual and that the adverse employment action was the result of intentional discrimination. See St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993); Mitchell, 12 F.3d at 1315.

In order to establish a prima facia case, Maxwell must show that: (1) he was protected by the ADEA; (2) he was demoted; (3) at the time he was demoted he was performing his job at a level that met his employer's legitimate expectations; and (4) "following his demotion, he was replaced by an individual of comparable qualifications outside the protected class." Mitchell v. Data Gen. Corp., 12 F.3d at 1315. The parties do not dispute the first three elements. However, Maxwell is unable to meet the fourth element of the Mitchell test.

The fourth element of the test is not satisfied if the plaintiff was replaced by an individual over 40 years old, even if that individual is younger than the plaintiff. E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 943-44 (4th Cir. 1992). After his demotion, Maxwell's duties were divided among two people, one of whom, Larry Coughenhour, was 53 at the time of replacement. Therefore, even if Maxwell was "replaced,"[1] Maxwell is unable to meet his burden to establish a prima facia case.

---

[1]Although this Court declines to rule on the point, there is some question as to whether Maxwell was replaced when two current employees took over his responsibilities. Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir.)("[A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work").

Maxwell also cannot directly or indirectly prove that E-Systems demoted him on account of his age. He has no direct evidence that the individuals who stripped him of his site leadership responsibilities - particularly Jeans - acted towards him with discriminatory intent. Nor does he have any direct evidence that management personnel who ordered the salary reduction were biased against him or anyone else account of his age. Failure at the summary judgment stage to produce evidence that the defendant's proffered reasons for the adverse action are merely pretextual or that the defendant was animated by discriminatory motive entitles the defendant to judgment as a matter of law. St. Mary's Honor Center, 113 S.Ct. 2742, 2747 (1993) (plaintiff always bears the burden of proof by a preponderance of the evidence that his employer engaged in intentional discrimination).

Maxwell also cannot prevail on his claim that he was discriminated against because of his disability. In order to succeed on his "perceived disability" claim, the plaintiff must show (1) that he did not have a substantially limiting impairment, and (2) that the employer perceived the impairment as constituting a substantially limiting impairment limiting one or more of his major life activities. E.E.O.C. Regulations, 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, Department of Mental Health, Retardation & Hosps., 10 F.3d 17 (1st Cir. 1993) (analyzing a perceived disability claim under the analogous Rehabilitation Act).

Even if Maxwell can establish that his defribulator and heart condition is an impairment under the ADA, he has no evidence from which a reasonable jury could conclude that E-Systems believed or perceived that the heart condition was a substantially limiting impairment affecting his major life activities. In any event, Maxwell has no evidence that the company perceived that his heart

condition affected his abilities to perform his job functions. The only evidence of discrimination - management's inquiry into his health in late 1991 and early 1992 in an effort to assure itself that Maxwell could perform his job duties without restriction - is not probative on either side of these two issues. And E-Systems dropped any inquiry into Maxwell's health as soon as Maxwell's cardiologist certified that he could perform his job responsibilities. Plaintiff concedes that there is no evidence that Jeanes requested the cardiologist certification for any other reason than the one Jeanes gave. He also admits that following the request for the doctor's certification in early 1992, E-Systems let him continue to work without interruption - operating heavy equipment on a multi-million dollar project - at the customer's site for another year, and that he was removed from the site only after he destroyed government property. Because he cannot produce evidence that E-Systems discriminated against him on the basis of a perceived disability, Maxwell's ADA claim must fail.

An appropriate Order shall issue.

ENTERED June 13, 1994.

/S/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

WALTER P. MAXWELL,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 93-1518-A
	)	
	)	
E-SYSTEMS, INC.,	)	
	)	
Defendant.	)	

By: Hon. Claude M. Hilton
United States District Judge

ORDER

This case came before the Court on defendant's Motion for Summary Judgment, and for reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendant's Motion is GRANTED, and this case is DISMISSED.

ENTERED June 13, 1994.

/S/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

APPENDIX PART THREE

EXCERPTS OF RECORD ON APPEAL

1. Deposition excerpts relating to 1992 incident.

a. Deposition of E-Systems Director John Jeanes:

Q: Do you believe that the test unit was hit by the removal machine --

A: Absolutely. We have the test unit. I'm sorry, I did it again. I didn't wait for you to finish.

Q: I was going to ask why? . . . .

* * * * *

A: And I'm not going to say. I can't tell you.

Court of Appeals Joint Appendix at 325-26.

b. Deposition of Walter Maxwell:

A: . . . . I do not believe we ever contacted the [test] equipment with the removal [machinery].

Q: Why do you say that, that you never contacted?

A: Because Mr. Jeanes has maintained that we did. There was a gouge on the test unit

when we removed it. I do not believe that the gouge in the equipment was consistent with the removal equipment.

* * * * *

A: Well, I told [Mr. Jeanes] that I did not believe that the removal equipment had contacted it, and that the scar or gouge on the test unit was not consistent with the damage that the test removal equipment would have done.

* * * * *

A: . . . . I expressed my belief that the marks on the test unit were inconsistent with what would have happened by direct contact from the removal equipment, and basically Mr. Jeanes said that he believed there was contact and that was it.

Court of Appeals Joint Appendix at 257, 259, 260.

2. <u>Excerpts from E-Systems March 31, 1993 Incident Report</u>

Memorandum from John W. Hale to J.W. Jeanes, 31 March 1993, re: Incident Report, Walter P. Maxwell:

As has been indicated to you verbally, it is the writer's opinion that further personnel action is unwarranted; hence, for the record, the writer

recommends that no further personnel action be taken. By being prohibited from participating in on-site activities at our remote site, and by being relieved from his L1211 Supervisor position, Walt has already 'taken the hit' for what was an accident under very poor working conditions.

For the record, you are very aware that Walt's accident in January is not the cause of the current activity . . .; this accident occurred during the planned recovery of a PCA/S-2 unit for failure analysis. Walt's accident did not cause the problems with the PCA/S-2, nor did the accident significantly obscure the failure mechanism. The PCA/S-2 problem existed before the accident. . . .

In an extenuating circumstance, Walt is, frankly speaking, in the 'retirement age category.' . . . Further personnel action may 'encourage' Walt to retire which, in the writer's opinion, is neither in the best interest of the CARDINAL O&M program, nor is it in the best interest of our Government Customer.

Court of Appeals Joint Appendix at 458.

3. Deposition excerpts relating to Stan Scalsky

a. **Deposition of Walter Maxwell:**

Q: So do you know whether Mr. Scalsky was considered for the site leader position?

A: I understand that he was considered.

Q: Do you know why he wasn't selected?

A: He told me that he was told that his age played a significant part in it.

* * * * *

Q: And in this conversation, just so I'm correct, Scalsky told you that he had been told that the reason he didn't get the site leader position was because of his age?

* * * * *

A: That's essentially how it went.

Q: Did Mr. Scalsky tell you who told him that?

A: Yes.

Q: Who?

A: He told me John Hale told him.

Court of Appeals Joint Appendix at 279-80.

b. **Deposition of Walter Maxwell:**

Q: Has Mr. Hale ever told you the reason why Scalsky wasn't chosen?

A: I asked John [Hale] after I talked to Stan [Scalsky] about it, and I'm trying to recall what his response was -- there was an avoidance-type response. He didn't come right out and say that he did it, but he said it was a possibility --

Q: Possibility that he said that?

A: That he had said that.

Court of Appeals Joint Appendix at 282.

c. **Deposition of John Hale:**

Q: In any of the discussions you had about selecting a new site leader, did Mr. Scalsky's age or health come up?

A: His health, no. There was a comment about, gee, it'd be nice to have someone as site leader with a little more longevity, you know, potential longevity with the company.

Q: Who made the comment about longevity?

A: Jeanes.

Court of Appeals Joint Appendix at 303.

4. Deposition exerpts relating to customer reaction

a. Deposition of Walter Maxwell:

Q: And what was the substance of that conversation [with the customer]?

A: Just discussed the accident and how we were proceeding, and he agreed that we were doing the right thing, to gather all the data that we could and proceed.

* * * * *

Q: During this conversation, did you think that the [customer] was upset about what had happened?

A: He did not appear to be.

Q: Did he say anything in the conversation to give you the impression that he wasn't upset?

A: He seemed to sympathize with us that we had the problem.

Court of Appeals Joint Appendix at 265-66.

b. Deposition of Walter Maxwell:

Q: . . . . Do you have any reason to believe that the actions you took at the site jeopardized [E-System's] future business with this same customer?

A: Since then we have signed a two-year contract to continue doing the work.

Court of Appeals Joint Appendix at 286.

5. <u>Deposition excerpts relating to E-Systems' replacement of Mr. Maxwell with Mr. Ascensio prior to the first asserted incident</u>

a. Deposition of Bobby G. Stilwell:

A: And we went out to hire a person to replace Walt. This was a couple of years ago, I guess. And we found this person that seemed like he would fit the job and would enhance E-Systems' eyes in view of our customer. And we hired him. And it takes about a year to six to eight months to get a clearance. And then we were going to have him work on the job for six or eight months to a year to learn what we were doing.

Court of Appeals Joint Appendix at 500.

A: And we actually made a change, or the decision was made. . . . [However,] the O&M customer we were dealing with . . . didn't want to do it. He thought it was a bad idea.

Court of Appeals Joint Appendix at 500.

b. Deposition of Frank Ascensio:

Q: Do you know why you were promoted to the position of acting engineering supervisor in January of '93?

A: Yes.

Q: Why is that?

A: Because the position had become vacant, and I was the best qualified candidate for the job. And in addition to that, a new management system was in the transition mode, being that for the past six months prior to January, maybe a little more, Walt, Walter Maxwell, and I had been transitioning in that I would eventually take over the position of engineering supervisor.

Court of Appeals Joint Appendix at 535.

6. <u>Deposition excerpts relating to the need for discipline of Mr. Maxwell</u>

Deposition of John Hale:

Q: 'Further personnel action is unwarranted.' Was that your opinion at the time?

A: That's my opinion, yes.

Q: Is that still your opinion?

A: Yeah, but it's past history

now.

Court of Appeals Joint Appendix at 306.